U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 12Dec2001

Case No.: 2001-INA-45

In the Matter of:

LAWRENCE BOOKMAN,
Employer,

on behalf of

MARLENE D. REIS,
Alien

Appearances: Jorge M. Dias, Esq.
Cambridge, Massachusetts
For Employer

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Marlene D. Reis ("Alien") filed by Lawrence Bookman ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF") and any written argument of the parties.

STATEMENT OF THE CASE

On November 13, 1997, the Employer filed an application for alien employment certification on behalf of the Alien to fill the position of Domestic Cook. The job to be performed was described as follows:

> Plan menus, order food and cook meals, in private homes, according to recipes or tastes of employer; peel, wash and prepare vegetables and meats for cooking, cook vegetables and bake breads and pastries; clean kitchen and cooking utensils; taking care of minor children, assisting them, driving them to and from school, etc.

(AF 27-28). Total hours of employment were listed as 40 hours a week, from 7:00 a.m. to 3:30 p.m., with overtime as needed. Minimum requirements for the position were listed as completion of high school and two years experience in the job offered.

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on June 8, 1999, citing 20 C.F.R. 656.20(c)(8), and instructing Employer to provide documentation clearly substantiating that the position of Domestic Cook in its household was a bona fide job opportunity and not a position created solely for the purpose of qualifying the alien as a skilled worker. The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" (those occupations requiring less than two years experience) is very limited, whereas there is no current waiting period for most immigrant visas in the "skilled worker" category (at least two years experience). The CO further noted that according to the *Dictionary of Occupational Titles (DOT),* almost all household positions are classified as unskilled; the occupation of Domestic Cook is an exception. Rebuttal evidence, at a minimum, was to include responses to twelve enumerated questions, including documentation where appropriate. The CO noted that the rebuttal documentation would be reviewed as a whole to determine whether the position of Domestic Cook actually existed in the household. (AF 9-11).

In Rebuttal, Employer responded that the job would take 3.5 hours a day, and 20 hours a week, to prepare the meals, including time to shop. The Employer also stated that they had someone else to help with the children when they came home from school at 3:30 p.m., but that the alien would be required to perform child care and general cleaning. The Employer indicated that the household had previously employed a Domestic Cook, but did not provide details. The Employer also stated that when the alien was initially hired, she did all of the cooking and cleaning. (AF 5-6).

The CO issued his Final Determination (FD) on July 15, 1999, denying the request for certification, on the grounds that the information submitted in rebuttal clearly demonstrated that there was not a bona fide Domestic Cook position to which U.S. workers could be referred. The CO noted that, in response to the questions set out in the NOF, the Employer provided two responses that showed the position was not bona fide. Thus, in response to a question about the length of time the alien spends preparing meals during each day and week, the Employer responded that the alien spends 3.5 hours a day, and 20 hours a week, including time to shop, in the preparation of food. The CO

concluded that this clearly demonstrated that there was no bona fide position. In addition, in response to a question as to whether the alien would be required to perform household duties other than cooking, the Employer responded that the alien would be required to perform child care and general cleaning. The CO concluded that the position was unskilled, not that of a skilled domestic cook. (AF 2-3).

Employer filed a Request for Administrative/Judicial Review on August 16, 1999. (AF 1). In his letter requesting appeal, the Employer stated that he had underestimated the time that the alien spent preparing meals, and that after actually observing the alien, he realized that it took about seven hours a day, plus shopping time of about two hours a week, for her to perform her cooking duties. He explained that his representative only gave him a few days to do the rebuttal.

The matter was docketed in this office on January 17, 2001.

DISCUSSION

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be bonafide, and that the job opening as described on Form ETA 750, actually exists and is open to U.S. workers. The burden of proof for obtaining labor certification is on the employer who seeks an alien's entry for permanent employment. § 656.2(b).

Employer was instructed in the NOF that "[r]ebuttal documentation must clearly substantiate that the position of Domestic Cook in your household is, in fact, a bona fide job opportunity and not a position that was created solely for the purpose of qualifying the alien as a skilled worker." Specifically, Employer was instructed to provide documentation and responses to 12 questions enumerated by the CO. In denying labor certification, the CO concluded that the details provided did not establish that there was a bona fide position for Domestic Cook. We concur.

In *Carlos Uy III*, 1997-INA-304 (Mar. 3 1999) (*en banc*), the Board set forth a "totality of circumstances" test to be used in order to determine the bona fides of a job opportunity in domestic cook applications. As stated by the Board in *Uy*:

> The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO's focus should be on such factors as whether the employer has a motive to misdescribe the position; what reasons are present for believing or doubting the employer's veracity for the accuracy of the employer's assertions; and whether the employer's statements are supported by independent verification.

Id.

The burden of proving that the employer is offering a bonafide job opportunity is on the

employer. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988) (*en banc*). As was noted by the Board in *Uy*, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8. Further, it is well settled that a bare assertion without either supporting reasoning or documentation is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Uy*, at 9.

Here, the Employer clearly indicated that the alien would spend only twenty hours a week performing cooking duties, and that she would also perform child care and household cleaning. This is consistent with the Employer's statements on the ETA 750, which requires the cook to take care of minor children, "assist" them, and drive them to and from school. It is also consistent with the Employer's previous employment of the alien, when she was paid to do all of the cooking and cleaning in the household.[1]

The burden of proof for obtaining labor certification lies with the Employer under § 656.2(b). Viewing the evidence as a whole, it is clear that the Employer failed to meet its burden. The CO's reasoning clearly shows that he conducted a totality of the circumstances analysis in reaching his conclusions, and his findings clearly show that he was correct in determining that certification should be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

For the panel:

A
LINDA S. CHAPMAN
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

[1] We do not consider the statements by the Employer, provided for the first time on appeal, that he underestimated the time that the alien actually spent cooking.

Chief Docket Clerk
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Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.